STATE OF MINNESOTA

IN SUPREME COURT

A18-0750

Court of Appeals

Lillehaug, J.
Concurring in part, dissenting in part, Anderson, J.,
Gildea, C.J.

White Bear Lake Restoration Association,
ex rel. State of Minnesota,

Appellant,

and

White Bear Lake Homeowners' Association, Inc.,
ex rel. State of Minnesota,

Appellant,

vs.

Filed: July 15, 2020
Office of Appellate Courts

Minnesota Department of Natural Resources, et al.,

Respondents,

and

Town of White Bear,

Respondent,

City of White Bear Lake,

Respondent.

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William P. Hefner, Jeremy Greenhouse, The Environmental Law Group, Ltd., Mendota Heights, Minnesota; and

Lloyd W. Grooms, Saint Paul, Minnesota, for amicus curiae Minnesota Chamber of Commerce.

S Y L L A B U S

1. Appellant associations stated a claim under the Minnesota Environmental Rights Act, Minn. Stat. § 116B.03, subd. 1 (2018), when they alleged that the Minnesota Department of Natural Resources polluted and impaired a lake and an aquifer by

mismanaging the groundwater-appropriations permitting process, and violating other Minnesota statutes for the protection of water.

2. Appellant homeowners association did not state a claim under the common-law public trust doctrine when it alleged, in essence, that the Minnesota Department of Natural Resources failed as trustee to maintain the waters of a lake for public use by authorizing the pumping of aquifer water for other public uses in the state.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

LILLEHAUG, Justice.

After White Bear Lake's water levels reached historic lows in the early 2010's, two associations sued the Minnesota Department of Natural Resources (the DNR) for pollution and impairment of the lake, primarily arising out of alleged mismanagement of the groundwater-appropriation permitting process. Both associations brought claims under Minn. Stat. § 116B.03 (2018), part of the Minnesota Environmental Rights Act (MERA), and one association brought a claim under the common-law public trust doctrine. In this appeal, we consider whether the associations stated claims upon which relief could be granted. We conclude that the associations stated a claim under section 116B.03, and thus we reverse the court of appeals' decision on that issue. We further conclude that one of the associations failed to state a claim under the public trust doctrine; thus, we affirm the decision of the court of appeals on that issue, although on different grounds. Finally, we remand to the court of appeals to address the remaining issues raised in this appeal.

FACTS

White Bear Lake is a closed-basin lake in Ramsey and Washington counties. It has no natural surface-water inlets or outlets and has a small watershed for a lake of its size. Its water levels therefore depend on precipitation, evaporation, and groundwater.

White Bear Lake's water levels have been recorded since 1924. The water levels have experienced significant fluctuations in that time, spanning a range of more than 7 feet. White Bear Lake's lowest water level was 918.84 feet, recorded on January 10, 2013. Other notable low-water periods include 1924–39 and 1988–93, which correlate to the Dust Bowl and a statewide drought.

The effect of groundwater on White Bear Lake's water level is at issue in this case. Appellants White Bear Lake Restoration Association (Restoration) and White Bear Lake Homeowners' Association (Homeowners) allege that White Bear Lake has been polluted and impaired by groundwater pumping from the Prairie du Chien and Jordan aquifers (collectively, "the aquifer"). White Bear Lake and the aquifer are hydrologically connected, meaning that aquifer groundwater levels have an effect on the lake's water levels. The aquifer is the most commonly used aquifer for drinking water in the Twin Cities metropolitan area. Annual withdrawals from the aquifer have more than doubled since 1980, from 1,873 million gallons in 1980 to 4,557 million gallons in 2007.

Minnesota Statutes §§ 103G.255–.299 (2018) authorize the DNR to manage groundwater and surface water appropriations through a permitting process. The permits contributing to the alleged over-appropriation from the aquifer were issued to

municipalities over the last four to five decades. Allegedly, many of the DNR's permits to municipalities are "evergreen," which means that they have no expiration date.

Restoration, a registered nonprofit corporation dedicated to the restoration and preservation of White Bear Lake, commenced this lawsuit against respondents the DNR and its then-commissioner, alleging MERA violations under Minn. Stat. § 116B.03, subd. 1, based on alleged pollution and impairment of White Bear Lake and the aquifer. Specifically, Restoration alleged that the DNR mismanaged the groundwater-appropriations permitting process, leading to materially adverse effects on the lake and aquifer including effects on the natural environment; recreational activities; historical, cultural, scenic, and aesthetic qualities; and on homes and businesses. Further, Restoration alleged that the DNR violated Minn. Stat. §§ 103G.211 (2018), .271, .285, and .287 and Minn. R. 6115.0270, .0670, and .0750 (2019)—all "environmental quality standards"—and thereby violated MERA, as well.[1]

Homeowners intervened in the district court as a plaintiff. Homeowners is a registered nonprofit formed to protect the water quality of White Bear Lake and help prevent the spread of invasive species. All of Homeowners' members hold riparian rights to the lake. Homeowners' complaint echoed Restoration's MERA claim and added another: a claim that the DNR had violated the common-law public trust doctrine. The

[1] Minnesota Statutes chapter 103G (2018) and Minnesota Rules chapter 6115 (2019) contain the provisions allegedly violated by the DNR. Minnesota Statutes chapter 103G is one of seven chapters constituting Minnesota's Water Law. The relevant provisions govern the use and appropriation of public waters, groundwater, and surface water. Minnesota Rules chapter 6115 contains DNR-adopted rules governing the use of public water resources, including rules regarding drainage and permits.

state and its agencies are trustees of White Bear Lake's waters and lakebed, asserted Homeowners' complaint, and the DNR's actions and failure to act violated its duty as trustee to maintain the lake's levels and water quality.

Respondents City of White Bear Lake and Town of White Bear intervened in the district court as defendants. Both are municipalities bordering White Bear Lake that hold DNR-issued permits, allowing them to pump groundwater from the aquifer.

In May 2013, the DNR filed motions to dismiss the associations' complaints, in part for failure to state claims upon which relief could be granted. The district court denied the motions. All parties filed motions for summary judgment in early 2014. The district court denied the motions of Restoration, the DNR, and the Town of White Bear in full. The district court granted Homeowners' motion in part, concluding that the public trust doctrine affords a common-law cause of action to protect public use of the water and lakebed of White Bear Lake, but denied summary judgment as to whether the DNR had breached its fiduciary obligation as trustee.

A bench trial began on March 6, 2017,[2] and took place over the course of three and a half weeks. Based on the evidence at trial, the district court found that the DNR had violated both Minn. Stat. § 116B.03 and the public trust doctrine. The court's broad injunctive relief prohibited the DNR from issuing permits for new wells or increasing

[2] The multi-year gap stems from the district court's approval of a 36-month stay in the case in 2014, which was meant to give the parties time to implement a settlement agreement. The settlement agreement was largely dependent on the Legislature providing funding to transition municipalities from groundwater to surface water. That funding was never provided.

appropriations within a 5-mile radius of White Bear Lake until the DNR complied with certain statutory requirements. These included, among other things, reviewing all existing groundwater appropriation permits within the 5-mile radius, reopening and downsizing noncompliant permits, analyzing the cumulative impact of permits, setting a trigger elevation of 923.5 feet for the lake, preparing a process for a contingent residential irrigation ban, and immediately amending all permits to require permit holders to submit a contingency plan for conversion to surface water sources.

The DNR appealed on nine grounds, arguing that the district court erred by:

> (1) allowing the action to proceed under Minn. Stat. § 116B.03 instead of Minn. Stat. § 116B.10, (2) misapplying the public-trust doctrine, (3) denying summary judgment on the ground that respondents failed to exhaust administrative remedies, (4) refusing to require joinder of affected permit holders not parties to the case, (5) interpreting MERA to require DNR to reopen and amend permits, (6) failing to give deference to DNR's permitting decisions, (7) violating separation-of-powers principles, (8) requiring DNR to amend existing permits without holding administrative hearings, and (9) making clearly erroneous factual findings.

White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res., 928 N.W.2d 351, 358 (Minn. App. 2019).

A divided court of appeals decided the first two issues, and did not reach the other seven. *Id.* at 358–59. The court concluded that neither Minn. Stat. § 116B.03 nor the public trust doctrine were available to afford relief to the associations. Deciding that the associations had made a prima facie showing under Minn. Stat. § 116B.10 (2018), however, the court remanded the MERA claims to the district court for remittitur to institute DNR administrative proceedings. *Id.* at 368. Judge Bratvold dissented on both issues. *Id.*

We granted review on the two issues reached by the court of appeals and denied the DNR's conditional cross-appeal on four issues.

ANALYSIS

I.

Whether the associations have stated claims upon which relief may be granted under Minn. Stat. § 116B.03 is an issue of statutory interpretation. Issues of statutory interpretation are questions of law, which we review de novo. *Bruton v. Smithfield Foods, Inc.*, 923 N.W.2d 661, 664 (Minn. 2019). The goal of statutory interpretation is to ascertain and effectuate the intent of the legislature. Minn. Stat. § 645.16 (2018). Words and phrases are construed according to rules of grammar and common and approved usage. Minn. Stat. § 645.08 (2018). If the legislative intent is clear, we apply the statute's plain meaning. *Fish v. Ramler Trucking, Inc.*, 935 N.W.2d 738, 741 (Minn. 2019).

The associations brought their MERA claims under Minn. Stat. § 116B.03, subd. 1. To determine whether they were appropriately brought under that section, we must first determine whether the associations pleaded all of the elements of a claim within the meaning of the statute. If so, we must then determine whether the claims are nevertheless barred by the no-action clause in section 116B.03, subdivision 1.

A.

Section 116B.03, subdivision 1, provides that "[a]ny person . . . may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of . . . natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction."

The parties agree that, under MERA, the associations are "person[s]" able to maintain a civil action, and the DNR is a "person" against whom a civil action may be maintained. *See* Minn. Stat. § 116B.02, subd. 2 (2018) (defining "person").

"Pollution, impairment, or destruction," as used in section 116B.03, subdivision 1, is defined by MERA as *either* (1) "any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit" *or* (2) "any conduct which materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subd. 5 (2018). The associations allege that the DNR's conduct has polluted and impaired White Bear Lake and the aquifer under both prongs of this definition.

Each prong covers "any conduct," a phrase not separately defined by MERA. But we have interpreted that phrase before, and have interpreted it broadly. In *County of Freeborn by Tuveson v. Bryson*, we said: "We believe the legislature intended the phrase 'any conduct' to have broad, all-inclusive application without enumerating every appropriate situation in which the act could be invoked." 210 N.W.2d 290, 296 (Minn. 1973). In *Tuveson*, Freeborn County initiated condemnation proceedings to acquire certain land for the construction of a highway. The county argued that Minn. Stat. § 116B.03 did not allow actions that would limit its powers of eminent domain. We disagreed, concluding that "[w]here a statute such as this is drafted in broad and comprehensive language, we are not justified in engrafting exceptions upon it." 210 N.W.2d at 296. We explained that "[e]ven a cursory reading of the act will indicate that the purpose of the legislation was to ensure that effects on the environment be considered by persons *conducting any type of*

activities within the state." *Id*. (emphasis added). In this case, the associations have alleged with specificity several *types of activities* by the DNR that violated environmental quality standards and materially adversely affected the environment, namely White Bear Lake. Consistent with *Tuveson*, the broad and comprehensive sweep of the statute encompasses the DNR's alleged activities.[3]

The DNR and the dissent argue that "conduct" does not include administrative action. We disagree. In *Tuveson*, we did not "engraft" any such exception upon MERA, even for eminent domain. Nor would engrafting such an exception make definitional sense. "Conduct" may be defined as "activities," 210 N.W.2d 296, "behavior," *The American Heritage Dictionary of the English Language* 278 (New college ed. 1982), or "the action or manner of managing an activity or organization," *The New Oxford American Dictionary* 358 (2001). The DNR's issuance of appropriation permits, management of the permitting process, and carrying out of its statutory water resource responsibilities fit any and all of these definitions. Plainly, the DNR engaged in "conduct."

Indeed, the Legislature expressly contemplated that the DNR would engage in, and be held accountable for, ongoing conduct in managing groundwater appropriation. The Legislature required the DNR to develop a "water resources conservation program," which includes "conservation, allocation, and development of waters of the state for the best

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[3] Also consistent with MERA's broad sweep, the few limits on MERA's application have been drafted narrowly and noted expressly. The Legislature, for example, provided that conduct cannot violate a standard, order, etc., solely by introducing an odor into the air. Minn. Stat. § 116B.02, subd. 5. It further provided that a family farm or other similar entity is not considered a "person" under the statute. *Id.*, subds. 2, 5.

interests of the people," to be used in "issuing permits for the use and appropriation of the waters of the state." Minn. Stat. § 103G.101, subds. 1–2 (2018). The Legislature gave the DNR the power to "establish water appropriation limits to protect groundwater resources," Minn. Stat. § 103G.287, subd. 3, and specifically directed that permits not issue unless "the groundwater use is sustainable to supply the needs of future generations and . . . will not harm ecosystems [or] degrade water," *id*., subd. 5.

The DNR's and the dissent's position that the phrase "any conduct" somehow excludes administrative conduct not only does not make definitional sense, it is flatly refuted by MERA's sister statute, the Minnesota Environmental Policy Act (MEPA). MERA was enacted in 1971, launching a wave of environmental legislation in the following years. MEPA was enacted just two years later, in 1973, "to complement MERA." *People for Envtl. Enlightment & Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 865 (Minn. 1978). MERA and MEPA are two of four pieces of environmental legislation which together form "a coherent legislative policy." *Id.* (construing the four environmental statutes together); *see also Floodwood-Fine Lakes Citizens Grp. v. Minn. Envtl. Quality Council*, 287 N.W.2d 390, 397 (Minn. 1979) (same).

MEPA expressly incorporates the very MERA definition at issue here: "pollution, impairment or destruction," including the phrase "any conduct." Minn. Stat. § 116D.04, subd. 1a(b) (stating that " '[p]ollution, impairment or destruction' has the meaning given it in section 116B.02, subdivision 5"). Having incorporated that definition, the same section of MEPA makes clear that "conduct" includes state administrative action, including the granting of permits:

> No state *action* significantly affecting the quality of the environment shall be allowed, nor shall any *permit* for natural resources management and development be granted, where such *action or permit* has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state . . . . Economic considerations alone shall not justify *such conduct*.

Minn. Stat. § 116D.04, subd. 6 (emphasis added).

Here, the associations sufficiently alleged DNR "conduct"—specifically, that two types of conduct polluted and impaired White Bear Lake and the aquifer in violation of section 116B.03, subdivision 1. First, they alleged that the DNR violated rules and environmental quality standards when it failed to comply with Minn. Stat. §§ 103G.211, .285, and .287, and Minn. R. 6115.0670. Second, they alleged that the DNR materially adversely affected White Bear Lake and the aquifer when it issued outsized permits on a case-by-case basis; failed to review permits on a cumulative basis or otherwise consider the overall impact; failed to reopen, amend, or right-size permits; failed to require alternative source planning; failed to impose mandatory irrigation bans; and imposed only one permit reduction. Plainly, the associations have alleged "conduct by" the DNR "which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit." Minn. Stat. § 116B.02, subd. 5. Alternatively, the complaints sufficiently allege "conduct which materially adversely affects or is likely to materially adversely affect the environment." *Id.* The DNR's alleged acts and failures

to act are actionable as "any conduct" polluting and impairing White Bear Lake and the aquifer under Minn. Stat. § 116B.03, subd. 1.[4]

B.

Although we did not grant review of the DNR's first issue for conditional review—whether the district court's order failed to give "deference" to the agency in violation of separation-of-powers principles—the DNR and the dissent rely on those principles. We do not understand the DNR and the dissent to contend that MERA, as we interpret it, is *unconstitutional*.[5] Rather, we understand that they use these principles as aids to interpret the phrase "any conduct" to exclude administrative conduct. Their reliance is misplaced.

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[4] The dissent's invocation of a Michigan case, *Preserve the Dunes, Inc. v. Department of Environmental Quality*, 684 N.W.2d 847 (Mich. 2004), is not persuasive. In that case, technical "flaws in the permitting process" were not conduct when they were "unrelated to whether the conduct involved has polluted, impaired, or destroyed . . . natural resources." *Id.* at 849. This case is not about technical flaws, but conduct alleged to violate Minnesota environmental laws and rules. In overruling *Preserve the Dunes* six years later, the Michigan Supreme Court aptly observed: "The permit from the [agency] serves as the trigger for the environmental harm to occur. The permit process is entirely related to the environmental harm that flows from an improvidently granted, or unlawful, permit." *Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality*, 793 N.W.2d 596, 601 (Mich. 2010). But upon rehearing after an intervening change in court membership, the 2010 opinion was vacated and the appeal dismissed as moot. *Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality*, 796 N.W.2d 240, 240 (Mich. 2011) (order). However murky Michigan law, when interpreting MERA, we have always engaged in our own analysis. *See State by Schaller v. Cty. of Blue Earth*, 563 N.W.2d 260, 265–67 (Minn. 1997) (adopting a "modified formulation" of Michigan's test based on Minnesota case law and MERA).

[5] Statutes are presumed to be constitutional. *In the Matter of J.M.M.*, 937 N.W.2d 743, 752 (Minn. 2020). Neither the DNR nor the dissent contend outright that the authority MERA grants to the judicial branch to adjudicate section 116B.03 claims, and to issue injunctive relief under section 116B.07 (2018), is unconstitutional.

We acknowledge, of course, that when an agency decision is appealed, and in the absence of a statutory standard of review, the separation-of-powers doctrine counsels that the reviewing court should give the administrative decision deference. *See Dokmo v. Ind. Sch. Dist. No. 11, Anoka-Hennepin*, 459 N.W.2d 671, 674 (Minn. 1990); *see also Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977); *Steenerson v. Great N. Ry. Co.*, 72 N.W. 713, 716 (Minn. 1897). But this lawsuit was commenced in district court; it was not an appeal from an administrative decision. Under MERA, the district court has original jurisdiction over pollution claims, including against state administrative agencies that the Legislature has designated as "persons." *See* Minn. Stat. § 116B.02, subd. 2 (defining a "person" who may be sued as including a "public agency or instrumentality"). Such agencies may be sued in district court and enjoined for "any conduct" that pollutes, impairs, or destroys the environment. Minn. Stat. § 116B.03, subd. 1. And the Legislature made clear that the MERA "rights and remedies provided . . . shall be *in addition to* any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available." Minn. Stat. § 116B.12 (2018) (emphasis added).

What we review today is not an administrative decision; we review judicial decisions of the district court and the court of appeals. In section 116A.09 (2018), MERA addresses judicial review of administrative decisions. *See* Minn. Stat. §116B.09, subd. 3 (governing "[a]ny action for judicial review"). This is not that. Thus, the associations are correct when they assert that they "do not seek review of an agency decision" because their theory is that there was no decision; the "DNR never reviewed the cumulative impact of its permits, the negative impacts to the Lake and Aquifer, or its violation of many

environmental laws and rules." And, as the district court—sitting as a fact-finder under section 116B.03, not as an appellate court—was careful to observe, it did not review the issuance of any single permit. Instead, the district court made findings of fact and conclusions of law on the various statutes and rules violated by the DNR, stating that "[t]hese are specific violations of statute by the DNR, and are properly the subject of court action."

More than 40 years ago, we put to rest the DNR's and the dissent's concern about MERA's relationship to the principles of administrative deference and the separation of powers. In *Minnesota Public Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977), we addressed civil actions brought under section 116B.03, subdivision 1, of MERA. We determined that, on such claims, no special deference is due to an administrative agency because "the trial court [sits] as a court of first impression and not as an appellate tribunal." *Id.* at 783 n.13. Further, we expressly addressed the role MERA assigned to the judiciary. When the trial court hears a claim such as this one:

> [MERA] does not prescribe elaborate standards to guide trial courts, but allows a case-by-case determination by use of a balancing test, analogous to the one traditionally employed by courts of equity, where the utility of a defendant's conduct which interferes with and invades natural resources is weighed against the gravity of harm resulting from such an interference or invasion.

Id. at 782.

Therefore, the responsibilities that MERA assigns to the courts are fully consistent with our judicial role. The principle of agency deference does not apply to actions under section 116B.03, which courts adjudicate in a fashion similar to traditional courts of

equity.[6] The DNR's and the dissent's invocations of deference and separation-of-powers principles are unavailing.

C.

Because the DNR's alleged conduct is actionable under Minn. Stat. § 116B.03, subd. 1, we next determine whether the claims are nevertheless barred by the same subdivision's no-action clause. A statute should be interpreted to give effect to all of its provisions. *Martin v. Dicklich*, 823 N.W.2d 336, 345 (Minn. 2012). A statute is to be read and construed as a whole, and each section must be interpreted in light of the surrounding sections to avoid conflicting interpretations. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000).

The no-action clause of section 116B.03, subdivision 1, bars civil actions "for conduct taken by a person pursuant to any . . . permit." Minn. Stat. § 116B.03, subd. 1. The DNR argues that the conduct, if any, that is allegedly polluting and impairing White Bear Lake and the aquifer is groundwater pumping, which is done pursuant to DNR-issued permits. Accordingly, asserts the DNR, the claims are barred by the no-action clause and must be brought under Minn. Stat. § 116B.10. Section 116B.10 contains another MERA

[6] Under MERA, a district court has broad equitable power. Minnesota Statutes § 116B.07 provides: "[t]he court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction." The dissent asserts that, in this case, the equitable relief ordered by the district court "reeks of impermissible encroachment by the judicial branch into executive branch authority." We decline to engage with the dissent on the appropriateness of the remedy. The issue is not before us; indeed, section 116B.07 is nowhere discussed in the DNR's brief.

right of action, providing for a civil action against a state agency where a person challenges "an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit . . . for which the applicable statutory appeal period has elapsed." Minn. Stat. § 116B.10, subd. 1. A plaintiff must make out a prima facie case that the permit is "inadequate to protect" natural resources. *Id.*, subd. 2. Fundamentally, argues the DNR, the associations are alleging that the groundwater appropriation permits are inadequate.

The DNR's argument requires that we define the phrase "pursuant to" in the no-action clause, as in "conduct taken by a person pursuant to" any permit. Although we have not defined the phrase in a MERA case, we have done so recently in another context in *Getz v. Peace*, 934 N.W.2d 347 (Minn. 2019). In that case, looking to legal dictionaries, we defined "pursuant to" to mean "under," "in accordance with," "in compliance with," or "in carrying out" the subject. *Id.* at 355. Applying these common-sense definitions to the no-action clause, to act pursuant to a permit means that the person was acting under, or in compliance with, the permit.

This reading finds support in other sections of MERA. Minnesota Statutes § 116B.04 (2018) establishes the burden of proof for section 116B.03 claims. For actions "governed by" environmental quality standards or permits, a plaintiff must make a prima facie showing that "the conduct of the defendant violates or is likely to violate" the standards or permits. Minn. Stat. § 116B.04(a). Section 116B.04(a) thus affirms that the scope of the no-action clause is narrow. The no-action clause does not bar claims merely because they *relate to* a permit. Instead, the clause provides a shield for permit holders

operating *in compliance with* a permit.[7]

In short, nothing in the plain language of the no-action clause shields an agency's conduct in issuing, reviewing, or amending permits—to the extent that the conduct violates standards or materially adversely affects the environment—from liability under section 116B.03. Here, the no-action clause does not insulate the DNR from the associations' claims under section 116B.03, subdivision 1.

But, argues the DNR, if one reads MERA as a whole, the associations' only remedy is under Minn. Stat. § 116B.10, which allows a person to challenge any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit as "inadequate" to protect natural resources from pollution, impairment, or destruction. If the challenger makes a prima facie showing of inadequacy, the action is remitted to the state agency that promulgated the subject of the action. Minn. Stat. § 116B.10, subd. 3.

We do not dismiss out of hand the possibility that the associations could have sought some relief under section 116B.10. But we do not understand the associations to be alleging that any single groundwater appropriation permit is "inadequate"; rather, the gravamen of the associations' MERA claim is that about 70 permits collectively and cumulatively, in combination with agency mismanagement and the violation of other environmental statutes, caused pollution and impairment of the lake and the aquifer. The

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[7] Two other courts have held that even that protection is limited by MERA. A no-action clause does not protect a permit holder whose conduct was allowed, but not strictly required, by a permit. *See Kennedy Bldg. Assocs. v. Viacom, Inc.*, 375 F.3d 731, 744–45 (8th Cir. 2004); *Williams Pipeline Co. v. Soo Line R.R. Co.*, 597 N.W.2d 340, 345–46 (Minn. App. 1999).

associations' MERA claim fits more neatly within section 116B.03 than within section 116B.10.

Further, nothing within section 116B.10, nor within any other part of MERA, for that matter, provides—or even suggests—that section 116B.10 is the exclusive remedy for all claims that have something to do with permits. Further still, there is no indication in section 116B.10 that it provides relief for agency conduct that violates state environmental statutes, rules, and standards. In this case, the associations pleaded that the DNR violated other environmental statutes and rules. Remittitur to institute DNR administrative proceedings on the agency's own alleged violations of state statutes and its own rules would be odd, indeed.

In the end, sections 116B.03 and 116B.10 are best read together as providing separate—and in some cases, alternative—causes of action. This reading is consistent with the Legislature's stated desire that MERA "provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction." Minn. Stat. § 116B.01 (2018). This interpretation is also consistent with the Legislature's intention that the MERA remedies "shall be in addition to any administrative [and] regulatory . . . rights and remedies." Minn. Stat. § 116B.12.

Accordingly, we conclude that the associations stated claims under Minn. Stat. § 116B.03, subd. 1.

II.

Next, we must determine whether Homeowners stated a claim under the common-law public trust doctrine. Homeowners alleged that the DNR violated its

fiduciary duties by failing to protect the trust asset, White Bear Lake.[8]

Whether the common law recognizes a cause of action is a question of law which we review de novo. *Nelson v. Productive Alts., Inc.*, 715 N.W.2d 452, 454 (Minn. 2006). "In determining whether Minnesota recognizes a particular cause of action this court must look to the common law and any statutes that might expand or restrict the common law. This court has the power to recognize and abolish common law doctrines . . . ." *Larson v. Wasemiller*, 738 N.W.2d 300, 303 (Minn. 2007).

The common-law public trust doctrine was first formally recognized by the United States Supreme Court in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 435 (1892). The doctrine entrusts the states with navigable waters and "the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters." *Id.* "[T]he State takes title to the navigable waters and their beds in trust for the public," and "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012). As *Illinois Central* made clear, "[t]he doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." 146 U.S. at 436.

[8] The parties have stipulated that White Bear Lake is protected under the public trust doctrine, as it was navigable at the time of statehood. Accordingly, Minnesota holds title to the lake and its lakebed in public trust. We discuss below the court of appeals' determination that the doctrine does not apply because groundwater is not navigable.

We have recognized the common-law public trust doctrine in Minnesota. *See, e.g.*, *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893). Consistent with the rationale of *Illinois Central*, the doctrine was used from its inception to define property rights in navigable waters, entrusting them to the state for public use rather than allowing riparian owners to assert a private property interest. *Id.* at 1143; *see, e.g.*, *Hanford v. St. Paul & Duluth R.R. Co.*, 44 N.W. 1144, 1144–45 (Minn. 1890) (discussing the rights of riparian owners to the submerged land extending to the point of navigability).

We discussed *Illinois Central* and the public trust doctrine in *State v. Longyear Holding Co.*, 29 N.W.2d 657 (Minn. 1947). We stated that, in exercising its authority, the state had a "right as trustee to dispose of beneficial interests in such lands, provided that in so doing it (a) acted for the benefit of all the citizens, and (b) did not violate the primary purposes of its trust, namely, to maintain such waters for navigation and other public uses." *Id.* at 670.

Applying our and the Supreme Court's precedent to the facts here, we are not inclined to extend the public trust doctrine to this situation. Homeowners does not allege that the DNR has violated its duty as trustee to protect public use from "private interruption and encroachment," which is the core rationale of the doctrine. *See Ill. Cent.*, 146 U.S. at 436. Nor does it allege that water has been diverted outside the state. Instead, Homeowners alleges that the DNR issued groundwater permits, primarily to municipalities, and thereby violated its duty as trustee. We have found no precedent—and, at oral argument, counsel for Homeowners could cite none—extending the public trust doctrine in this way.

We are generally reluctant to extend the common law unless there is a compelling reason to do so. *See Cent. Hous. Assocs., LP v. Olson*, 929 N.W.2d 398, 408 (Minn. 2019). And we tend to proceed cautiously when a subject is extensively regulated by statutes and rules. Here, the field of public water use is heavily regulated by the State. The Legislature has decided that "[t]o conserve and use water resources of the state in the best interests of its people, and to promote the public health, safety, and welfare, it is the policy of the state that: (1) subject to existing rights, public waters are subject to the control of the state; [and] (2) the state, to the extent provided by law, shall control the appropriation and use of waters of the state." Minn. Stat. § 103A.201, subd. 1 (2018).

Twenty-five chapters within Minnesota Statutes are dedicated to water protection, use, and appropriation. Minn. Stat. ch. 103A–114B (2018). Together, those chapters cover policy, conservation, water resources, groundwater, wells, ditches, dams, and more. Subject to the statutory limits implicated in this case, the Legislature has granted the DNR commissioner permitting authority to be exercised for "the use, allocation, and control of waters of the state." Minn. Stat. § 103G.255. Those allocations are to be based on priorities established by the Legislature, which makes "domestic water supply" the first priority. Minn. Stat. § 103G.261(a)(1). Because the Legislature has established structures within which public water use priorities are to be balanced, and no private encroachment or diversion to another state has been alleged, we see no need to extend the judiciary's common-law role in this instance.[9]

[9] By contrast, in *Central Housing*, we developed the common law to recognize a defense to evictions in retaliation for tenant complaints about landlords' material violations

Although we affirm the court of appeals' result on this issue, we do not adopt its reasoning. The court of appeals determined that the public trust doctrine did not apply on the theory that groundwater is non-navigable, and is therefore not protected as a public water. 928 N.W.2d at 367. In this respect, the court of appeals misunderstood Homeowners' contention: that the DNR has permitted the degradation of public water—White Bear Lake—by abdicating its duties as trustee to manage groundwater and surface water levels. We do not understand Homeowners to be urging that groundwater is either held in public trust or that the doctrine should be extended to make it so.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the decision of the court of appeals. Because respondents raised additional issues on appeal that the court of appeals did not reach, we remand to the court of appeals for decision on the remaining issues on appeal.

Affirmed in part, reversed in part, and remanded.

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of law. There, we identified both a compelling reason to recognize the defense and a need to fill a (perhaps inadvertent) gap in statutory law. 929 N.W.2d at 409–10. Neither exists here.

C O N C U R R E N C E & D I S S E N T

ANDERSON, Justice (concurring in part and dissenting in part).

I agree with the court's holding that the public trust doctrine does not apply here. I do not agree with the court's holding that the term "any conduct" in Minn. Stat. § 116B.02, subd. 5 (2018), of the Minnesota Environmental Rights Act (MERA) includes executive branch agency decisions. Because the court fails to perform any meaningful statutory analysis, I respectfully dissent.

A.

The court interprets Minn. Stat. § 116B.03, subd. 1 (2018), to reach administrative decisions by an executive branch agency, here the Department of Natural Resources (DNR). The plain language of the statute states:

> Any person . . . may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of . . . natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction . . . .

Minn. Stat. § 116B.03, subd. 1. "Pollution, impairment, or destruction," as used in section 116B.03, subdivision 1, is defined by MERA as either (1) "*any conduct* by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit," or (2) "*any conduct* which materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subd. 5 (emphasis added). The court concludes that "any conduct" includes "administrative conduct," which, here, is the DNR's alleged failure to make certain permitting decisions desired by appellants White Bear Lake Restoration Association and

White Bear Lake Homeowners' Association. No precedent of our court supports the conclusion reached by the court in this dispute.

Although the court announces that executive branch decisions are "conduct" under the statute, it does so without any meaningful analysis of the statutory term "conduct." Instead, the court relies on passing dicta in *County of Freeborn by Tuveson v. Bryson*, as definitively answering the question in this case. 210 N.W.2d 290 (Minn. 1973). *Tuveson* has little application here.[1]

In *Tuveson*, a county planned to condemn a strip of private land for the purpose of relocating a county highway. *Id.* at 293. That strip of land included part of a wildlife marsh. The landowners brought suit in district court to obtain "injunctive relief to restrain the county from acquiring the [property of the landowners] and from constructing a highway on it, claiming such conduct was prohibited by the Minnesota Environmental Rights Act." *Id.* The issue before us in *Tuveson* was whether the state's sovereign power of eminent domain, appropriately delegated to the county, could be limited by MERA, which was silent about its impact on a county's eminent domain powers. On this narrow question we held that the Legislature "intended in appropriate cases that the power of eminent domain possessed by governmental subdivisions—including the power of a

[1] Not only does the court decide this case based on dicta drawn from a decision of dubious relevance, but also the language on which the court relies is unrelated to a statutory analysis of the word "conduct," which is the issue actually before us. *Tuveson* interprets only the word "any," a word not disputed here. *Id.* at 296. Moreover, the *Tuveson* dicta, on which the court relies, is drawn from dicta in a commercial lease case. *Id.* (quoting *Orme v. Atlas Gas & Oil Co.*, 13 N.W.2d 757, 763 (Minn. 1944)). All that is to say, *Tuveson* provides no authority for the court's decision today.

county to condemn land for a public highway—was to be limited by the provisions of the act." *Id.* at 296.

The issue of whether MERA interacts with the eminent domain powers of a political subdivision has no bearing here. As we noted in *Tuveson*, the power of eminent domain is an essential attribute of sovereignty; and a delegation of that power by the Legislature to subordinate jurisdictions can be modified or withdrawn by the state. *Id.* at 295. The delegation of this power to a county, which is a legislatively created subdivision of the state, does not implicate the separation of powers doctrine in the way it does in the instant case. And while we granted review on only two issues, and other issues remain to be decided after our opinion in this matter is issued, including certain constitutional arguments raised by the DNR, the issue I raise below regarding separation of powers should also guide us in our statutory interpretation work.

Rather than relying on irrelevant dicta, this court should apply our canons of interpretation, beginning with a plain meaning analysis. *See Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 716–17 (Minn. 2014) ("If the legislature's intent is clear from the unambiguous language of the statute, we apply the statute according to its plain meaning."). Because the word "conduct" is not defined by the statute, we look first to the plain and ordinary meaning of the word. *Cent. Hous. Assocs., LP v. Olson*, 929 N.W.2d 398, 403 (Minn. 2019). To determine the plain meaning of a word, we begin with dictionary definitions. *Id.*

The definitions used by the court of appeals are well chosen and useful here. "Conduct," as a noun, means "the manner in which a person behaves, especially in a

particular place or situation." *Oxford Dictionary of English* 364 (3d ed. 2010). Another helpful definition is "personal behavior; way of acting; bearing or deportment." *The Random House Dictionary of the English Language* 426 (2d ed. 1987). This contrasts with "decision," which is defined as "the act of reaching a conclusion or making up one's mind." *The American Heritage Dictionary* 484 (3d ed. 1992). An executive branch decision, including the process of gathering and analyzing information, and ultimately deciding on whether to grant a permit, is not "conduct."[2] Even if the DNR had mismanaged the permitting process, as appellants allege, that mismanagement itself did not create pollution or impairment. Rather, the acts by another party are what led to any pollution or impairment. I agree with the common-sense, plain-language conclusion of the court of appeals that

> [t]he conduct alleged to have impaired the lake's water levels is groundwater pumping. The DNR issued, maintained, and reviewed groundwater-appropriation permits necessary for municipalities to extract groundwater. The DNR has only one tool for regulating water appropriations—permits. The complained-of conduct that impairs the lake is the withdrawal of groundwater in conformity with or under the authority of the DNR's permits.

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[2] The court cites no state or federal court decisions that hold that an executive branch decision is conduct reached by Minn. Stat. § 116B.03, subd. 1, or equivalent statutes, and none are immediately apparent. To the contrary, the only case law on the subject is from the Michigan Supreme Court, which held that "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends [the Michigan Environmental Protection Act]." *Pres. the Dunes, Inc. v. Dep't of Envtl. Quality*, 684 N.W.2d 847, 853 (Mich. 2004). We have specifically recognized that MERA is modelled after the Michigan Environmental Protection Act. *State by Schaller v. Cty. of Blue Earth*, 563 N.W.2d 260, 265 (Minn. 1997). In doing so, we also borrowed from the reasoning of Michigan's Supreme Court when interpreting the statute. *See id.* at 266. Applying the same harmonization, I would adopt the view that administrative decisions do not constitute conduct.

White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res., 928 N.W.2d 351, 361 (Minn. App. 2019).

The court relies heavily on the Minnesota Environmental Policy Act (MEPA) to support its interpretation. But MEPA establishes that "conduct" is not the boundless catchall that the court holds it to be. The statute *expressly* distinguishes conduct from other types of activities. In defining "governmental action," it separates regulating, approving, and permitting a project from conducting a project. *See* Minn. Stat. § 116D.04, subd. 1a(d) (2018) (" 'Governmental action' means activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government including the federal government.").[3] Thus, conduct is distinct from permitting and regulating, which is what the DNR did in this case.

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[3] In referring to MEPA, the court plucks the sentence, "Economic considerations alone shall not justify such conduct" out of context to support its interpretation. The court claims that the cited sentence "makes clear that 'conduct' includes state administrative action, including the granting of permits." This reasoning fails for two reasons. First, the "such conduct" to which the sentence refers is "

Second, and more to the court's argument, MEPA undermines the claim that MERA reaches administrative decisions (or actions under the court's framing). The very sentence that the court's interpretation hinges on is undermined by the language in the preceding sentence, which clearly, and expressly, distinguishes actions from permits. *See* Minn. Stat. § 116D.04, subd. 6 (2018) (stating that "[n]o state *action* significantly affecting the quality of the environment shall be allowed, nor shall any *permit* . . . where such *action or permit* [satisfies certain requirements]" (emphasis added)).

The only conclusion from MEPA is that granting a permit and the conduct allowed by the permit are distinct. Issuing a permit merely allows the permit holder to engage in certain conduct. Although it allows the conduct, the permit is not conduct itself.

The DNR did not pump the groundwater that caused the alleged decline in lake levels. The DNR made a decision, within its authority, to grant permits—the DNR did not pump a single gallon of groundwater out of White Bear Lake or the aquifer. At most, the DNR consumed electricity and paper (and perhaps some ink) to effectuate its administrative decision to issue a permit, which can hardly be considered pollution or impairment under the statute. If the act by the DNR of issuing a permit is "conduct" under MERA, the reach of MERA is essentially without limit.

Of course, the DNR could engage in conduct that causes pollution as defined by Minn. Stat. §§ 116B.01–.13 (2018). The DNR could engage in conduct by building a dam or treating a lake with herbicides that materially affect the environment. The DNR could construct an administrative building to house employees that violates certain environmental quality standards. These types of activities could be conduct under chapter 116B. But an executive branch decision to issue a permit is no more "conduct" than a court decision allowing certain conduct to proceed. Thus, based on the plain language, as well as the use of the term "conduct" in sister statutes, I would hold that conduct does not include administrative agency decisions.

B.

Beyond the court's strained and radical interpretation of MERA, the court's holding raises troubling constitutional issues that are avoided by affirming the court of appeals as set out in Part A of this dissent. The root constitutional problem created by the court's decision is that it raises serious separation of powers concerns because it arguably encroaches on the powers of the executive branch. As drafted—and as interpreted by the

DNR, the court of appeals, and my dissent—the statute is consistent with our separation of powers doctrine. But now, and in future cases in which an argument is made that MERA applies to some executive branch decision, we have a statute that delegates to the judicial branch the de novo review of executive branch decisions and provides a right to equitable relief commanding the executive branch to carry out executive functions in a manner the judicial branch demands.[4]

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[4] Although not at issue before us (yet), I also have serious doubts regarding the standing of appellants. Appellants allege statutory standing under MERA, but it is unclear whether their complaint alleges a concrete and particularized injury. Minnesota Statutes § 116B.03, subd. 1, is analogous to the "citizen-suit" provision of the Endangered Species Act (ESA) at issue in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992). The Supreme Court of the United States has been clear that, under federal private cause of action statutes, while the scope of cognizable injury can be expanded by statute, Article III constitutional standing cannot. *Id.*

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Id. at 576. The *Lujan* Court held that this type of statutory or "procedural injury" does not satisfy the Article III case and controversy requirement and thus violates the separation of powers. "Individual rights," within the meaning of the ESA citizen-suit statute, "do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public," even if part of the public is a "subclass of citizens." *Id.* at 578, 577.

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," . . . and to become "virtually continuing monitors of the wisdom and soundness of Executive action."

We have consistently stated that the Legislature may not "delegate to the judiciary duties which are essentially administrative in character" and that we view with "disfavor statutes which specify trials de novo and which attempt to confer original jurisdiction on trial courts over policy matters which are the responsibility of the legislative and executive branches." *See, e.g.*, *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977); *see also Dokmo v. Indep. Sch. Dist. No. 11, Anoka-Hennepin*, 459 N.W.2d 671, 674 (Minn. 1990) (stating that "[c]onstitutional principles of separate governmental powers require that the judiciary refrain from a de novo review of administrative decisions" and quoting the language from *Reserve Mining Co.*).

Appellants seek injunctive relief from the district court. They ask the district court to require the DNR to "restore water levels in White Bear Lake to a protected elevation of 923.5 feet or another level to be determined by the court," along with other injunctive relief dictating the DNR's management of White Bear Lake and the Prairie du Chien-Jordan aquifer. This type of relief reeks of impermissible encroachment by the judicial branch into executive branch authority. At issue is not judicial deference to an administrative agency decision, but rather whether the doctrine of separation of powers between co-equal branches is violated. An interpretation of MERA that allows a district court to serve as a quasi-executive agency, determining the appropriate water elevations to which the DNR

Id. at 577 (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984) (internal citation omitted). The Supreme Court has "always rejected" this view of its role. *Id.* Although not before us, I am doubtful that the provisions of MERA granting "any person" the ability to bring a citizen suit against the DNR to challenge administrative decisions unrelated to individual interests can withstand constitutional muster.

should manage the lakes, violates the constitutionally required separation of powers. *See State v. Leonard*, 943 N.W.2d 149, 160 (Minn. 2020) ("If we can construe a statute to avoid a constitutional confrontation, we are to do so." (citation omitted) (internal quotation marks omitted)). In *Steenerson v. Great N. R.R. Co.*, we avoided this type of encroachment. 72 N.W. 713, 716 (Minn. 1897). In *Steenerson*, the appellant asked our court, in accordance with a statute, to review an executive branch decision setting railroad rates. *Id.* There we said:

> If by this the legislature intended to provide that the court should put itself in the place of the commission, try the matter de novo, and determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. *The fixing of rates is a legislative or administrative act, not a judicial one. . . . And the performance of such duties cannot, under our constitution, be imposed on the judiciary.*

Id. (emphasis added) (citations omitted). This is still as true today as it was over 100 years ago.

As discussed above, the court's statutory analysis does not address this issue. In *Steenerson* we construed the statute to avoid an unconstitutional construction, and this would be the better route for the court to take today. We have consistently said that we should interpret statutes to avoid constitutional problems. *Limmer v. Ritchie*, 819 N.W.2d 622, 628 (Minn. 2012) ("We need not resolve that thorny separation of powers problem here, however, because we are to construe statutes to avoid a constitutional confrontation if it is possible to do so." (citations omitted) (internal quotation marks omitted)); *see Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 17 (Minn. 2002); *State ex rel. Pearson v.*

Prob. Court of Ramsey Cty., 287 N.W. 297, 302 (Minn. 1939); *see also* Minn. Stat. § 645.17(3) (2018) (stating that in interpreting statutes, courts should presume that "the legislature does not intend to violate the Constitution of the United States or of this state"). We will do so "even if the construction that avoids a constitutional confrontation is the less natural construction so long as the construction is a reasonable one." *Limmer*, 819 N.W.2d at 628 (citations omitted) (internal quotation marks omitted). The court's interpretation that an executive branch decision, which it describes as "administrative conduct," falls within the category of conduct covered by Minn. Stat. § 116B.03, subd. 1, raises significant separation of powers issues and violates our interpretive principle to avoid constitutional issues.[5] Appellants do not challenge a permit decision here, the kind of administrative action routinely reviewed by courts and provided for by other statutes.[6] Rather, appellants

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[5] The court declines to apply the avoidance doctrine, stating that it presumes all statutes are constitutional. But that presumption is not in tension with the avoidance doctrine; rather, it works in tandem with it. If a constitutional issue arises from a particular interpretation, the court should not strike down the statute as unconstitutional when it can find another interpretation that is constitutional. This is a longstanding principle of statutory interpretation in our state.

[6] To the contrary, this type of focused review of quasi-judicial administrative decisions is required to preserve separation of powers. *See Breimhorst v. Beckman*, 35 N.W.2d 719, 734 (Minn. 1949) (holding that quasi-judicial executive branch decisions must not be final and must be reviewable via certiorari in order to not infringe on judicial branch functions).

The district court's review here is not of a quasi-judicial administrative decision, e.g., reviewing an agency permitting decision, but rather it is judicial review of quintessential executive branch functions. I would afford the executive branch the same comity as it relates to separation of powers that this court has demanded of the executive branch. *See Holmberg v. Holmberg*, 588 N.W.2d 720, 725–26 (Minn. 1999) (holding that a child support statute allowing an administrative law judge to modify district court child support orders violates the separation of powers doctrine and thus is unconstitutional

challenge the manner in which the executive branch operates, including how it broadly enacts policy objectives to manage lake water levels. The courts are in no position to determine the elevation of White Bear Lake. The relief sought here is a judicial command to the executive branch as to how the executive branch performs internal functions, a result that violates the separation of powers doctrine, an interpretation rendering the statute unconstitutional. *See Holmberg v. Holmberg*, 588 N.W.2d 720, 726 (Minn. 1999) (holding that violation of the separation of powers doctrine renders a statute unconstitutional).

The court's opinion, at a minimum, introduces constitutional uncertainty that is wholly unnecessary. Instead, as provided earlier in this opinion, I would interpret the statute to avoid these constitutional issues.

Thus, I would hold that, standing alone, administrative decisions do not harm the environment. Only conduct—i.e. action—that pollutes, impairs, or destroys the environment are conduct covered under the statute. The DNR's decision to issue permits, which is an executive branch administrative agency decision, simply is not conduct under MERA. This interpretation accords with the plain meaning of the statutory language and avoids creating constitutional issues. It is for these reasons that I would affirm the court of appeals and thus respectfully dissent.

GILDEA, Chief Justice (concurring in part and dissenting in part).

I join in the concurrence and dissent of Justice Anderson.

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because the Legislature may not "delegate[] to an executive agency the district court's inherent equitable power" even though there were public policy reasons for the statute).